No. 14,745

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN ROGERS MACKENZIE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the District of Oregon.

APPELLANT'S REPLY BRIEF.

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Table of Authorities Cited

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Here, as in *Wollam v. United States,* No. 14,744, we shall not reargue the case in chief but shall respond only to those matters urged by the Government which we deem require comment. Furthermore, by reason of the stipulation and order heretofore filed herein, we shall materially shorten this brief by making reference to our reply brief in the *Wollam* case.

I.

In this case, as in Wollam's, the argument is made that this Court may not examine the full transcript

of the testimony taken by the subcommittee. For the reasons assigned in our *Wollam* Reply Brief, we believe that this position is not well taken.

In any event, the "record" before the trial Court here contains sufficient to show the basis upon which appellant feared self-incrimination. Thus, committee counsel testified that "the committee was here investigating subversive and un-American activities in this area" (R. 40), and in response to a question respecting the committee's "purpose" of subpoenaing witnesses before the committee, he replied:

> "The committee was possessed of information from confidential investigative sources . . . that people in this area, one of whom was the defendant here today, had information on the general subject of communism and subversive activities in this area . . ." (R. 41).

More specifically, when asked why appellant particularly was called as a witness, committee counsel replied:

> "Well, in Mr. MacKenzie's case, personally and particularly, the committee, as I said a moment ago—when I was speaking in general—the committee had information with regard specifically to Mr. MacKenzie, that he was possessed of information concerning communist and subversive activities in this area . . ." (R. 42).

With respect to each of the four questions asked of appellant, the "record" is equally clear that the purpose was in some way to connect appellant with "com-

munist infiltration" into industry (R. 46) or education (R. 47-48). See, also, R. 57, 62.

In this case, as in Wollam's, the "record" contains an offer of material from Portland newspapers published preceding the time appellant was called, which further demonstrates the basis for his fear of self-incrimination (R. 72-74; Exhibits 10, 11 and 12).

II.

The Government makes the added point here that the claim of the privilege made before the Subcommittee was not made in good faith because subsequently, during the course of the trial below, appellant filed an affidavit in support of his motion to dismiss in which he averred that he was a resident of Clackamas County, Oregon (Brief for Appellee, p. 2), and that he had attended one term at Reed College (Brief for Appellee, p. 9). But this totally ignores the difference in the "settings". Before the trial Court, appellant was not facing a committee determined to ferret out his connections with the Communist party, and he had no reason to fear that his statements to the trial judge would be the basis of further questions tending to link him with communism.

His conduct at the trial does not constitute abandonment of his prior claim, but even if it did, this would have no effect upon the validity of the claim at the time he asserted it.

In *Bart v. United States,* 349 U.S. 219 at 222, it was said:

> "An abandonment made two and one-half years after the objections were raised cannot serve retroactively to eliminate the need of a ruling. If the requirement of criminal intent is not satisfied at the time of the hearing, it cannot be satisfied *nunc pro tunc* by a later abandonment of petitioner's objection."

In *United States v. Rumely,* 345 U.S. 41 at 48, it was said:

> "In any event, Rumley's duty to answer must be judged as of the time of his refusal."

It is clear from the foregoing, that appellant's refusals must be tested in the light of the situation as it existed when he was called before the Committee, and not in the light of some other situation which subsequently developed.

III.

Here as in *Wollam* the Government lays store by the "personal philosophy" of appellant which it says demonstrates that his claim was not made in good faith (Brief for Appellee p. 11). As we pointed out in *Wollam,* if appellant had a lawful basis for declining to answer, his motives were immaterial.

The Government also argues, as it does in *Wollam,* to sustain the claim of the privilege in this case will deprive it of its right to obtain testimony by com-

pulsion. Judge Frank's observations in *United States v. Gordon,* 236 F. 2d 916 (2 Cir.), which we quoted in our *Wollam* Reply Brief, are a complete answer to this contention.

Finally, conceding that some of the questions "might conceivably have been incriminating" (Brief for Appellee, p. 10), the Government nonetheless urges that the conviction for refusal to answer others may be upheld. We have shown in our Opening Brief why all of the questions were incriminating, but even if this were not so, the Government's position is not tenable.

> "The government argues that answers at least to some of the questions, when taken singly, are remote from any tendency to incriminate. Even so assuming *arguendo,* we reject that argument for these reasons: The questions together form such a cluster as to interrelated matters that to separate out any one of them, treating it as if it stood alone, would be to artificialize the actualities. Moreover, although the same situation existed in Trock's case, the Supreme Court did not deal with any one of the questions singly but sustained the privilege as to all."
>
> *United States v. Gordon*, 236 F. 2d 916, 920, (2 Cir.).

In *Maffie v. United States,* 209 F. 2d 225 (1st Cir.), Chief Judge Magruder disposed of a similar contention in this manner:

> "It is possible that a few of the questions which Maffie declined to answer could have been answered without any tendency to incriminate him;

but if so, the answers to this small residue would have been so far removed from any disclosures possibly useful to the prosecution that it would have been a perfectly futile thing to order Maffie to go back to the grand jury to answer them. We would be reluctant to uphold a conviction for criminal contempt based upon a refusal to obey the District Court's order as far as this insignificant residue is concerned; it would be too much like a case of the tail wagging the dog." (209 F. 2d at 231.)

IV.

We do not discuss here, because we have thoroughly covered it in our *Wollam* Reply Brief, the failure of the indictment to allege that appellant's refusal was wilful or unlawful or without just or proper cause or excuse. Nor do we consider here, because we feel that the points have adequately been covered in the Opening Brief, questions relating to pertinency and insufficiency of the evidence. Our failure to discuss them is obviously not to be construed as a waiver. On the contrary, we urge the points strongly but simply feel that no good purpose will be served in lengthening this brief by a repetition of arguments already made.

In conclusion, it seems clear, from the entire picture before this Court, that this is a case in which a witness properly claimed the privilege against self-incrimination. At the time he was called to testify he had been

identified as a Communist and placed in Communist party meetings. He knew that the purpose of the inquiry was to connect him with the communist movement. He had a perfect right therefore not to answer any questions which might conceivably establish that connection or even give the Government a lead in that direction. The recent decisions of the Supreme Court and of this Court require that his conviction be reversed.

Dated, San Francisco, California,
December 5, 1956.

Respectfully submitted,
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By NORMAN LEONARD,
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